Louisiana Law Review

Volume 48 | Number 2
Developments in the Law, 1986-1987: A Faculty Symposium
November 1987

Professional Responsibility

Warren L. Mengis

PROFESSIONAL RESPONSIBILITY

*Warren L. Mengis**

Introduction

On December 18, 1986, the Supreme Court of Louisiana approved new rules of professional responsibility and declared that they were to become effective on January 1, 1987.[1] These rules, patterned after the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) adopted in August of 1983, were the work of a task force of the Louisiana State Bar Association (LSBA). This task force had been charged with the responsibility of studying and evaluating the ABA Model Rules and reporting to the House of Delegates and Board of Governors.

The adoption of these rules is significant to all practitioners because they have made several major changes from the Code of Professional Responsibility (Code). First are changes in the format. The Code's short axiomatic norms (Canons) followed by aspirational objectives (Ethical Considerations—EC's) and mandatory rules (Disciplinary Rules—DR's) have been supplanted by fifty-two black letter rules which in form resemble a Restatement. All of the rules are mandatory with the exception of Rule 6, which deals with pro bono activities. Although the ABA Model Rules include both a preamble and comments to the rules, our supreme court did not adopt either. The task force, however, in its report to the House of Delegates, suggested that the introductory comments in the ABA Code, the "comments" under each of the Model Rules, and other materials in the ABA document should be considered as precatory to any interpretation or application of the Louisiana version of the Model Rules, except to the extent that they are inconsistent with the rules adopted by the House of Delegates.

Along with the format change, the careful reader will observe a change in direction from a strong emphasis on the lawyer's duty to the client to a more balanced emphasis on duty to the system of justice and duty to others. One very respected writer on professional respon-

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* Professor of Law, Louisiana State University.

1. In re LSBA Applying for Auth. to Adopt the Model Rules of Prof'l Conduct of the LSBA as Art. XVI of the Articles of Incorporation of the LSBA in lieu of the present Art. XVI being the Code of Prof'l Resp. of the LSBA, order dated Dec. 18, 1986 (effective Jan. 1, 1987), to be codified as La. R.S. 37: Ch. 4 App., art. 16 (Supp. 1987).

sibility has called this a change from a "loyalty code" to an "integrity code."[2]

Other changes are also of major importance to the practitioner. Rule 1.1(b) requires the lawyer to comply with the minimum requirements of continuing legal education prescribed by the Louisiana Supreme Court. Mandatory continuing legal education was adopted by the supreme court at the same time it adopted the new rules; however, the effective date of the requirement of continuing legal education is January 1, 1988.

Rule 1.4 requires the attorney to give his client sufficient information to participate intelligently in decisions concerning the objectives of the representation and to keep him reasonably informed about the status of his case or business.

Rule 1.5, dealing with fees, is quite similar to the provisions of DR 2-106 of the Code, but there are some changes. A new client shall be told the basis or the rate of the fee, either before or within a reasonable time after the representation begins. It is recommended that this information be put in writing. All contingent fee agreements must be in writing, and shall state the method by which the fee is to be determined. At the conclusion of a contingent fee matter, the lawyer must provide the client with a written statement giving the outcome of the matter, showing the remittance to be made to the client, and providing the method of the remittance determination. Attorneys who perform under contingent fee contracts should immediately revise their forms to track the requirements of Rule 1.5(c).

Two other changes are accomplished in Rule 1.5. Contingent fees are now prohibited in domestic relation matters if that fee is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement. This rule seems to at least partially overrule *Olivier v. Doga*,[3] which held that once a separation or a divorce was obtained, a contingent fee thereafter established could be based on the amount of property which the attorney secured for his client in the separation of the community.

Another change involves referral fees. Under the Code, such fees were prohibited unless the referring attorney did some of the work on the case, and even then the fee had to be commensurate with the work done. Under the new rule, the referring attorney may share in the fee under either the proportion of work rule, or by a written agreement with the client in which each lawyer assumes joint responsibility for the representation.

Perhaps the most significant change from the Code is the latitude now given to the attorney to represent conflicting and adverse interests.

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2. Patterson, An Inquiry into the Nature of Legal Ethics: The Relevance and Role of the Client, 1 Geo. J. Legal Ethics 43, 44-45 (1987).

3. 384 So. 2d 330 (La. 1980).

The old Canon 9 "appearance of improprietary" has now been suppressed and the lawyer may place himself between two clients, or between a client and a former client with interests materially adverse, provided each client or former client consents to the representation after consultation. The rules add, however, that when representation of multiple clients in a single matter is undertaken, the consultation shall include an explanation of the implications of the common representation, along with the advantages and risks involved.[4] Rule 2.2 even permits the lawyer to act as intermediary *between clients* provided the effect on the attorney-client privilege and the implications of the common representation, including the advantages and risks involved, are fully explained to each client and each consents to the common representation. Even so, the lawyer must believe that he can undertake the mediation impartially and without material prejudice to the interests of either client. With all due respect to those who drafted the Model Rules, these provisions are a trap for the unwary and an invitation to a malpractice action. This is particularly true when the feelings of the two "clients" may be smoldering.

Another significant addition to Louisiana's ethical rules is Rule 3.6 on trial publicity. The Code simply referred the attorney to the local rules of court. Rule 3.6 sets out an attempted balancing of free press versus fair trial and adopts the standard of "a substantial likelihood of materially prejudicing an adjudicative proceeding." The clear and present danger standard, which was adopted by the Louisiana Supreme Court in *Economy Carpets v. Better Business Bureau*,[5] appears to be overruled.

Rule 5.1 helps to clear up an area of confusion concerning the responsibilities of a lawyer having direct supervisory authority over another lawyer and the responsibility of the subordinate lawyer to the supervising attorney. Rule 5.2 makes it clear, however, that the subordinate lawyer is subject to the new rules, notwithstanding the fact that he acted at the direction of another attorney.

The only rules which are not mandatory are Rules 6.1 through 6.4, dealing with pro bono publico service. Virtually all of the information contained therein was contained in the ethical considerations under the Code. Thus, there are no surprises.

Finally, it should be pointed out that direct mail advertising is now permitted in Louisiana pursuant to Rule 7.3. This is different from the ABA Model Rules which prohibit mailing to a select group, although a general mailing is permitted. Louisiana's Rule 7.3 requires that the letter be identified as advertising material, both on the communication itself and on the envelope, and requires the attorney to submit a copy

4. Model Rules of Professional Conduct Rule 1.7(b)(2).
5. 237 So. 2d 301 (La. 1976).

of the written communication to the association prior to, or when, the material is first transmitted to any prospective client.

Attention should also be directed to the task force recommendation of the continuation of the "*Edwins* rule,"[6] which permitted the attorney to advance funds to his client for humanitarian purposes. The supreme court, however, declined to follow the recommendation and returned to a prohibition against financial assistance except for advancement of court costs and expenses of litigation.[7]

Since our last symposium,[8] there have been many interesting decisions by our appellate courts involving professional responsibility. Some of these are reviewed below.

Pro Bono

When the right to free counsel exploded in the 1960's, culminating with *Argersinger v. Hamlin*,[9] this writer observed that many partners in prestigious law firms usually delegated court appointments to their associates, particularly where the partner practiced on the civil side only. Occasionally, a judge would insist that the appointed lawyer represent the accused, but usually both the court and the accused recognized that more competent representation would take place with the younger attorney.

Two recent cases touched upon this area, although they did not decide the question of whether the appointment can be delegated. In *State v. Alcinder*,[10] the supreme court, in granting a rehearing, stated that the trial court must appoint a lawyer, not a law firm. Justice Dennis, concurring, pointed out that individual defense counsel in criminal cases should be appointed in order that an attorney will have personal responsibility for the representation, rather than a firm or a group, which would have only collective responsibility. In *City of West Monroe v. Conley*,[11] the third circuit held that the fact that an attorney limits his practice to civil matters does not justify revocation of an appointment to represent an accused in a criminal matter. The court also held that an appointment against the will of an attorney does not violate her constitutional rights.

The fifth circuit in *State v. Weary*[12] reaffirmed the proposition that a court has the inherent power to require an attorney to represent an

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6. Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437 (La. 1976).
7. La. R.S. 37: Ch. 4 App., art. 16, R. 1.8(e) (1987).
8. Mengis, Developments in the Law, 1985-1986—Professional Responsibility, 47 La. L. Rev. 415 (1986).
9. 407 U.S. 25, 92 S. Ct. 2006 (1972).
10. 507 So. 2d 1242 (La. 1987).
11. 491 So. 2d 785 (La. App. 3d Cir. 1986).
12. 490 So. 2d 1121 (La. App. 5th Cir. 1986).

indigent, with or without compensation, as an obligation burdening his privilege to practice and serve as an officer of the court. In *State v. Weary*, it appears that the attorney appointed by the court to represent three persons charged with violation of probation agreed to do so only upon the condition that he be paid at the rate of $100.00 for each defendant. With this figure being acceptable to the judge, the attorney then presented a voucher to the indigent defender board of the parish of Jefferson. Thereafter, the representation apparently took place, but the indigent defender board refused to pay the fees because the trial judge failed to follow the provisions of the indigent defender law set forth in Louisiana Revised Statutes 15:144[13] and following. After some legal maneuvering, the trial court ordered the payment of the $300.00, but the appellate court reversed, setting aside the award of compensation because the trial court did not proceed as statutorily mandated. The attorney was apparently never paid for his services.

Bernhardt v. Fourth Judicial District[14] indicates that all is not well in other parishes. The problem is usually underfunding of the indigent defender board rather than overcharging by attorneys. Volunteer panels will disappear if at least minimally reasonable compensation is not available. By Act 94 in 1986, the legislature attempted to give the indigent defender boards another option to solve the problem. The boards may now contract with one or more lawyers or law firms to provide counsel for all or a significant portion of indigent defendants. Whether this will prove successful remains to be seen.

Effective Assistance of Counsel

It is now well settled that absent knowing and intelligent waiver, no person may be imprisoned for any offense unless he was represented by counsel at trial.[15] "Counsel," of course, means "effective counsel." The two leading decisions in this area are *Strickland v. Washington*[16] and *United States v. Cronic*.[17] In *State v. Lowenfield*,[18] the accused argued that his rights to effective assistance of counsel were violated by his counsel's attempt to withdraw. He failed, however, to specify any lapse in his counsel's performance which prejudiced his defense. Citing the two part *Strickland* test, deficient performance and prejudice to the client therefrom, the court found no merit in Lowenfield's assignment of error. In *State v. Mitchell*,[19] failure to object to certain

13. La. R.S. 15:144 (1981).
14. 501 So. 2d 1077 (La. App. 2d Cir. 1987).
15. State v. Skeetoe, 501 So. 2d 931 (La. App. 2d Cir. 1987).
16. 466 U.S. 668, 104 S. Ct. 2052 (1984).
17. 466 U.S. 648, 104 S. Ct. 2039 (1984).
18. 495 So. 2d 1245 (La. 1985).
19. 498 So. 2d 1190 (La. App. 3d Cir. 1986).

testimony was urged by the defendant as evidence of ineffectiveness of counsel. Again, the *Strickland* test was cited in the court's denial of the assignment of error.

Even though effective assistance of counsel is fundamental in securing a fair trial for an accused, the Supreme Court of the United States has also held that this right may be waived.[20] The procedure for waiving counsel, however, must be followed very carefully, or the Court may find that the accused did not knowingly and intelligently waive his right. Before explaining the various rights which the accused is giving up by pleading guilty, the trial court must first ascertain the level of the defendant's literacy, competency, understanding, and volition. Thereafter, the judge may explain the consequences of a plea of guilty and accept the defendant's plea.[21]

Limitations on this right to effective counsel are pointed out in *State v. Balfa*[22] and *State v. Delatt*.[23] An indigent defendant does not have the right to have a particular attorney appointed to represent him. The right to choose counsel only extends so far as to allow the accused to retain the attorney of his choice if he can manage to do so. Even that right is not absolute; it can neither be manipulated so as to obstruct the orderly procedure of a court nor be used to obstruct the administration of justice. Accordingly, an attempt by an accused to dismiss his appointed counsel a week before a scheduled trial will not be countenanced.

Finally, the United States Supreme Court, in *Pennsylvania v. Finley*,[24] reiterated the rule that there is no constitutional right to counsel when a prisoner mounts a collateral attack on his conviction.

> Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, a fortiori, he has no such right when attacking a conviction that is long since become final upon exhaustion of the appellate process.[25]

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20. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975).
21. State v. Skeetoe, 501 So. 2d 931, 936 (La. App. 2d Cir. 1987).
22. 506 So. 2d 1369 (La. App. 3d Cir. 1987).
23. 506 So. 2d 898 (La. App. 1st Cir. 1987).
24. 107 S. Ct. 1990 (1987).
25. Id. at 1993 (citations omitted).

Destruction or Concealment of Physical Evidence (Attorney-Client Privilege)

In Re Ryder[26] was a disciplinary action in the United States District Court for the Eastern District of Virginia. Mr. Ryder was charged with concealing stolen money and a sawed off shotgun used by his client in a robbery in order to secure the acquittal of his client. Mr. Ryder argued that his actions were protected by the attorney-client privilege since the information concerning the whereabouts of the money and the shotgun had come from his client. The court, in a landmark decision, held that no rule of ethics or law permitted Mr. Ryder to conceal either the money or the shotgun, inasmuch as the money was the fruit of the crime and the shotgun was an instrumentality used in committing it. That which can be seized from the hands of the client can be also seized from the hands of the attorney.

The leading case on the subject prior to Ryder was *State v. Olwell.*[27] The Washington Supreme Court had held in *Olwell* that, although an attorney might take an instrumentality of the crime and hold it for a reasonable period of time to examine it, to test it, and otherwise prepare for trial, as an officer of the court he must thereafter turn the instrumentality over to the prosecution. The fact that the client delivered such evidence to the attorney may be privileged, but the *object itself* does not become privileged by reason of its transmission to the attorney.

It is evident from the above that an attorney has conflicting duties when presented with physical evidence which may be incriminating to his client. He obviously has the duty of loyalty to his client, but he also has a duty of candor to the court. If the attorney fails to make a thorough investigation which might turn up physical evidence, he is certainly not being effective counsel from a constitutional standpoint, and is also violating his ethical duties. On the other hand, if this thorough investigation does turn up the physical evidence either from his client or from some third person, the attorney finds himself on the horns of a dilemma.

In the first situation, where the physical evidence is delivered by the client or its location is made known to the attorney by the client, the general rule is that the information imparted is privileged, but the object itself is not. As a corollary, the attorney could not be compelled to disclose how he came into possession of the physical evidence, but he would be compelled to turn it over to the prosecution. Exceptions to this rule are illustrated by *People v. Meredith*[28] and the Louisiana

26. 263 F. Supp. 360 (E.D. Va. 1967).
27. 64 Wash. 2d 828, 394 P.2d 681 (1964).
28. 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981).

case of *State v. Taylor*.[29] The first exception occurs when a client communicates the location of the physical evidence to his attorney in a privileged communication and the attorney then removes or alters the evidence. Since the prosecution would then be prevented from finding the evidence in its original state, the California Supreme Court held in *Meredith* that the attorney could be compelled to give evidence as to where it was obtained, or what its state was at the time of its discovery. The second exception, described in *State v. Taylor*, applies when the attorney comes into possession of the evidence unlawfully as the result of a lawyer's participation in a conspiracy to conceal it.

A second situation occurs when possibly incriminating evidence comes into the possession of the attorney through a third person. The leading cases are *People v. Lee*,[30] *Morrell v. State*[31] and *Hitch v. Pima County Superior Court*.[32] In *Morrell*, the Alaska Supreme Court held that a criminal defense attorney has an obligation to turn over to the prosecution physical evidence that comes into his possession through the acts of the third party who is neither a client of the attorney nor an agent of the client. To the same effect was the holding in *People v. Lee* by the California court. Both courts basically held that the attorney-client privilege does not exist in such a situation. In both *Morrell* and *Lee*, the attorney apparently had a choice either to take the physical evidence or not, but an additional requirement was thrown in by the Arizona court in *Hitch*. The defense attorney, said the court, has an affirmative duty to take possession of the evidence from a third party and turn it over to the prosecution unless the attorney is reasonably certain that the third party will not conceal it or destroy it. This puts the defense attorney in an extremely difficult position. He cannot simply turn his back on the evidence. He must investigate to determine if it is potentially incriminating and then, in addition, whether or not the third party might destroy or conceal it. In effect, he must now switch sides to the prosecution while ostensibly remaining loyal to his client.

A related problem is whether or not the defense attorney can be put on the stand and forced to tell where he got the physical evidence which he was compelled to deliver to the prosecution by virtue of his ethical duties. The *Hitch* court went further and stated that if the attorney would enter into a stipulation with the prosecution setting up the trail of the evidence so as to make it admissible, he would not have to testify. Yet, logically, the only thing to which the attorney could stipulate is from whom he received it, for he would have no personal knowledge

29. 502 So. 2d 537 (La. 1987).
30. 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (1970).
31. 575 P.2d 1200 (Alaska 1978).
32. 146 Ariz. 588, 708 P.2d 72 (1985).

as to where the third party did in fact find the evidence. To put it mildly, for the defense attorney, *Hitch* will be a difficult decision with which to live.

State v. Green,[33] the companion case of *State v. Taylor*, involved a situation where the gun used to commit a crime was delivered to the attorney, who subsequently turned it over to the prosecution. After the attorney had withdrawn from his representation, he was subpoenaed to the trial of the matter and compelled to testify concerning his acquisition of the weapon. The state contended that it had to lay a proper foundation in order to connect the gun with the accused. The Supreme Court of Louisiana returned to the general rule that where the incriminating evidence was delivered by the client to the attorney in the course of the attorney-client relationship, the state must prove the connection between the evidence and the defendant without in any way relying on the testimony of the client's attorney who initially received the evidence. "*The attorney may not be called to the stand and examined* as to any of the circumstances which preceded his possession and subsequent delivery to police of a piece of physical evidence—here the gun."[34] In holding that the attorney was obligated to turn the evidence over to the prosecution, the court relied on DR 1-102(A)(5), DR 7-102(A)(3), DR 7-102(A)(7) and the recently adopted obstruction of justice statute, Louisiana Revised Statutes 14:130.1.[35]

The *Taylor* case also decided the interesting question as to what a court should do when it suspects a conspiracy between the client and the attorney to conceal physical evidence. Initially, Justice Cole wrote for the court that the trial court should hold a full evidentiary hearing at which the party opposing the privilege would have the burden of proving the existence of the conspiracy. Upon a prima facie showing of conspiracy, the attorney-client privilege would be vitiated pending resolution of the merits of the claimed privilege. At the hearing, both the attorney and the client may be called to testify if necessary, and the attorney-client privilege may not be interposed as an obstacle to examination. The trial court then must determine the merits of the claim of conspiracy as any other question of fact. On rehearing, the majority held that the evidentiary hearing should be in conformity with Louisiana Code of Criminal Procedure article 703 and that proof of the alleged conspiracy should be by a "preponderance of the evidence." Justice Cole dissented because he felt that if there was in fact an ongoing crime or conspiracy, there was no attorney-client privilege, and there could be no breach of the constitutional requirement of "effective assistance";

33. 493 So. 2d 1178 (La. 1986).
34. Id. at 1184.
35. La. R.S. 14:130.1 (1986).

consequently, no justification existed for using the motion to suppress as the procedural vehicle. The majority, on the other hand, believed that the importance of the attorney-client privilege justified the use of the motion to suppress to test the admissibility of such communications prior to trial.

Conflict of Interests

As pointed out in Rule 1.7 of Louisiana's new rules, loyalty is an essential element in the lawyer's relationship to a client. Therefore, as a general rule, a lawyer should not represent one client if the interests of that client conflict with those of another client. Any dealings between a lawyer and his client should be scrupulously fair to the client. As to former clients, confidentiality must be preserved and none of the information which the lawyer received in the course of the representation of the former client may be used against the former client in any present representation of another client.

The relationship between an attorney and his client is intended to be personal, unique, and fiduciary. As pointed out in *Plaquemines Parish Commission Council v. Delta Development Co.*:[36] "[I]n no other agency relationship is a greater duty of trust imposed than in that involving an attorney's duty to his client."[37] The *Plaquemines Parish* case was before the Louisiana Supreme Court on an exception of prescription which had been sustained in the lower courts. In the course of its opinion, although the breach of fiduciary duty had been stipulated, the court set forth the history of an attorney-client relationship which reeked of conflict of interests wherein the attorney enriched himself to the detriment of his client. Such matters will now be covered by Rule 1.8 relating to prohibited transactions between an attorney and his client.

A similar case is *Boisdore v. Bridgeman*,[38] wherein the jury found that an attorney-client relationship existed and that the attorney had violated the standards of professionalism, care, and fiduciary duty which he owed to his client. In affirming, the appellate court, after outlining the detailed business dealings between the attorney and his client, said:

> Although an attorney may deal with his client and acquire an interest in his client's property in exchange for services rendered, his actions should be subjected to the most exacting scrutiny. In such situations, the attorney is under a continuing duty to fully inform his client of all aspects of the transaction. Moreover, when a transaction between attorney and client is

36. 502 So. 2d 1034 (La. 1987).
37. Id. at 1040.
38. 502 So. 2d 1149 (La. App. 4th Cir. 1987).

> attacked, the burden is on the attorney to prove that the transaction was made in the best of faith without disadvantage to the client; that it was fair and equitable; and that the client was fully informed of his rights and so was able to deal with the attorney at arms length.[39]

The jury awarded a total of $243,000 in damages against the attorney, but this amount was reduced by the trial court to the sum of $150,000. The judgment n.o.v. by the trial court was reversed, and the jury award was reinstated by the court of appeal.

Rule 3.7 establishes the general rule that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness. Although there are exceptions to the rule, it is generally advisable for the attorney who is likely to be called as a witness to terminate the representation. In *Hebert v. First Guaranty Bank*[40] a motion was made to disqualify the plaintiff's counsel on the basis that his testimony was needed at trial, by both his own client and by the defendants, on two related subjects. The trial court denied the motion, and the appellate court, after an examination of the record, found that trial counsel's role had not been compromised to such an extent as to require disqualification.

Another interesting facet of the *Hebert* case, concerning the duty of an appointed counsel in attempting to locate an absentee defendant, was brought out more fully in Judge Lanier's dissenting opinion.[41] Simplified, the question is whether appointed counsel must go beyond the pleadings which are served upon him, or whether he simply can take the avenue of least resistance and put an ad in the paper. At least the dissenting judge felt that the court-appointed counsel failed to use reasonable diligence in not contacting the plaintiff bank, or its attorney, to see if they had any information omitted from the petition which might help him locate the defendant. Since due process standards in giving notice are now being looked at carefully, attorneys appointed to represent an absentee should explore every conceivable avenue to locate the defendant.

Attorney's Fees

The shootout between the Louisiana Supreme Court and the Louisiana legislature over who has the right to control attorneys' fees stipulated in a promissory note continued during 1986-87. In our last

39. Id. at 1154-55 (citations omitted).
40. 493 So. 2d 150 (La. App. 1st Cir. 1986).
41. Id. at 158.

symposium[42] we discussed *Graham v. Sequoya Corp.*[43] and the most recent amendment to article 2000 of the Louisiana Civil Code. The last sentence of that article now reads: "If the parties, by written contract, have expressly agreed that the obligor shall also be liable for the obligee's attorney fees in a fixed or determinable amount, the obligee is entitled to that amount as well."[44] The reader should notice that the attorney's fee obligation flows to the obligee of the promissory note and not to the attorney. This is in accord with such cases as *American General Investment Co. v. St. Elmo Lands*,[45] *McCarthy v. Louisiana Timeshare Venture, Inc.*,[46] and *First National Bank of Lafayette v. Doni Homes, Inc.*[47] It certainly could be construed as a legislative overruling of *General Investments, Inc. v. Thomas*[48] and *Jefferson Bank and Trust Co. v. Post*.[49]

The fireworks began with the first circuit case of *Central Progressive Bank v. Bradley*.[50] In this case, Judge Lanier reviewed the jurisprudence and the legislative enactments, and concluded that the attorney's fee stipulated in both the mortgage and the promissory note was owned by the holder of the note and not the attorney. Judge Lanier not only relied upon the legislative amendment of article 2000, but also upon DR 5-103 which prohibited the holder's attorney from acquiring a proprietary interest in the obligation sued upon. In all of the writer's experience as a practicing attorney, he has never seen a judgment on a promissory note stipulating an attorney's fee which divided the award between the holder of the note and a particular attorney. It would make just as much sense to add a third party to the judgment, such as the clerk of court for the court costs.

Unfortunately, the Louisiana Supreme Court in *Central Progressive Bank*,[51] a per curiam opinion, reversed the appellate court decision, holding that the prohibition against excessive attorney fees cannot be abrogated by a law fixing the amount of attorney fees as a percentage of the amount to be collected. "Notwithstanding Article 2000, the courts may inquire into the reasonableness of such a fee."[52] The writer does not disagree with the proposition that courts may always look into the

42. Mengis, supra note 8, at 420.
43. 478 So. 2d 1223 (La. 1985).
44. La. Civ. Code art. 2000.
45. 391 So. 2d 570 (La. App. 4th Cir. 1980).
46. 426 So. 2d 1342 (La. App. 4th Cir. 1982).
47. 338 So. 2d 1202 (La. App. 3d Cir. 1976).
48. 422 So. 2d 1279 (La. App. 5th Cir. 1982).
49. 312 So. 2d 907 (La. App. 4th Cir. 1975).
50. 496 So. 2d 525 (La. App. 1st Cir. 1986).
51. 502 So. 2d 1017 (La. 1987).
52. Id.

reasonableness of the attorney's fee, and admittedly, the supreme court does not say in *Progressive* that the fee stipulated in a promissory note belongs to the attorney. However, that is precisely the holding of *Walker v. Investment Properties, Ltd.*[53] If this case is to be followed, an attorney, having been designated by the holder of the note, should include himself as a party plaintiff in the suit on the note. If he does not, the debtor may except to that part of the claim which the holder presents for attorney's fees since the fees are an obligation in favor of the attorney rather than the holder.

All of this confusion actually stems from the "American Rule," which provides that attorney's fees are never shifted unless there is a contractual provision or a statute which so provides. This is also the general rule in Louisiana.[54] Financial institutions are obviously interested in shifting their attorney fees to the debtor in the same manner that parties to a purchase agreement or a building contract would be interested in shifting the costs of their attorneys to the losing or breaching party. In none of those situations should a separate cause of action arise in some attorney yet to be designated. The supreme court could still inquire into the reasonableness of any attorney's fee, which the holder of the note or the contracting party had obligated itself to pay, without creating any specific cause of action in the attorney. This seems to be the approach taken by the court in *Scott v. Noel.*[55]

In any event, considering the cases just mentioned, the statement in *Bank of St. Charles v. Fire Protection Systems, Inc.*,[56] that the well established prior jurisprudence was brought back from its judicial grave by the Louisiana legislature, seems to be premature since the supreme court in *Progressive* calls upon its constitutional powers to slam the door on the legislature.

Two other cases consolidated for trial, *McNamara v. Stauffer Chemical Co.*[57] and *City of Baton Rouge v. Stauffer Chemical Co.*,[58] demonstrate that the court will not only interfere in private contracts where attorney's fees are an issue, but also in the statutory award of attorney's fees. The trial judge had rejected the provisions of Louisiana Revised Statutes 47:1512,[59] which mandates a ten percent attorney's fee where private counsel is employed by the tax collecting body, and instead fixed as the attorney's fee, $50,000. The difference in the statutorily set fee and the fee set by the court was over $600,000. Although the trial court

53. 507 So. 2d 850 (La. App. 5th Cir. 1987).
54. Nassau Realty Co. v. Brown, 332 So. 2d 206 (La. 1976).
55. 506 So. 2d 1313 (La. App. 2d Cir. 1987).
56. 497 So. 2d 25 (La. App. 5th Cir. 1986).
57. 500 So. 2d 397 (La. 1987).
58. 506 So. 2d 1252 (La. App. 1st Cir. 1987).
59. La. R.S. 47:1512 (1970).

had held the provisions of the statute to be unconstitutional, the supreme court rejected that approach and simply held that its provisions are subject to judicial scrutiny, on a case by case basis, regarding whether the attorney's fee as mandated by law is reasonable and not excessive under the circumstances.[60]

Several other attorney's fee cases merit a passing glance. In *Walton v. Walton*,[61] the court held that a client's medical bills, whether advanced by the attorney or guaranteed by him, were not covered by the attorney's privilege and form no part of the attorney's fee. In *Sims v. Selvage*,[62] the court held that, although an attorney is not prohibited by the Code of Professional Responsibility from advancing costs of litigation and medical treatment to his client, the refusal or failure to do so by the attorney is not good cause to discharge him. The court cited *Louisiana State Bar Association v. Edwins*;[63] it might be well to reiterate that the effect of that decision has been terminated by the adoption of the new rules. In *Phillips v. Rowe*,[64] an attorney who had voluntarily terminated his practice of law for health reasons and had failed to pay his Louisiana State Bar Association dues was denied a claim for referral fees for a case he had referred to another attorney prior to his discontinuance of practice. The court relied on the prohibition against sharing of legal fees with a non-lawyer, concluding that the plaintiff was a "non-lawyer" even though he still had a valid certificate to practice law. In *Sessions, Fishman, Rosenson, Boisfontaine, and Nathan v. Taddonio*,[65] the court approved the practice of charging a client for time spent on a case by an associate of the attorney who was actually hired. It seems rather strange that the client should complain since undoubtedly the hourly rate of the associate, who had recently been admitted to practice, was considerably less than that which would have been charged had the retained attorney done the same work.

Malpractice

A movement which is gaining considerable support throughout the United States is the recognition of rules of ethics as rules of law. One of its chief proponents is Professor L. Ray Patterson, Pope Brock Professor of Law at the University of Georgia School of Law.[66] Professor

60. 500 So. 2d at 401.
61. 490 So. 2d 1093 (La. App. 3d Cir. 1986).
62. 499 So. 2d 325 (La. App. 1st Cir. 1986).
63. 329 So. 2d 437 (La. 1976).
64. 499 So. 2d 208 (La. App. 2d Cir. 1986).
65. 490 So. 2d 526 (La. App. 4th Cir. 1986).
66. Patterson, Wanted: A New Code of Professional Responsibility, 63 A.B.A.J. 639 (1977); see also Patterson, supra note 2.

Patterson confesses that one major barrier to the bar's acceptance of the rules of ethics as rules of law is concern for their use as a basis for lawyer liability even though both the Code of Professional Responsibility and the Model Rules contain caveats against this possibility. That very assertion, that the attorney was guilty of malpractice for having violated EC 2-23, was made in *Reed v. Verwoerdt*.[67] In rejecting the contention, the court said "[t]hus far, however the Louisiana Supreme Court has not viewed the Code of Professional Responsibility as formulated malpractice rules."[68] It is difficult to see any logical distinction between using ethical rules to modify contracts or statutory enactments and using ethical rules for malpractice liability. The *Reed* case also illustrates one of the disadvantages of filing suit against a client for unpaid legal fees, as the client may fight back with a reconventional demand asserting malpractice by the attorney.

As usual, quite a few of the malpractice cases within the last year dealt with the question of prescription. It is now fairly well settled that the usual prescriptive period against an attorney is one year. However, when an attorney expressly warrants a particular result (e.g., guarantees winning a lawsuit, guarantees title to property, guarantees or warrants the ultimate legal effect of his work product, or agrees to perform certain work and does nothing whatsoever), then clearly there is a ten-year prescriptive period.[69] In addition, it has been held that prescription does not begin to run until damages are sustained,[70] or, as stated by Chief Justice Dixon in *Succession of Albritton*,[71] prescription against attorney malpractice could not begin to run until the client had reason to doubt the accuracy of her attorney's advice.

The third circuit applied both of the above principles in *Olivier v. National Union Fire Insurance Co.*,[72] wherein an attorney was sued for malpractice because of his omission of a critical provision in the act of surrender executed by the natural mother prior to an adoption proceeding. The court first considered that it was a negligence action which was prescribed by one year, but then went on to hold that prescription did not begin until there was a final judgment against the adopting parents. The adoption was being handled by the same attorney who was being sued for malpractice.

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67. 490 So. 2d 421 (La. App. 5th Cir. 1986).

68. Id. at 427.

69. Cherokee Restaurant v. Pierson, 428 So. 2d 995 (La. App. 1st Cir. 1983), writ denied, 431 So. 2d 773 (La. 1983).

70. Rayne State Bank and Trust Co. v. Nat'l Union Fire Ins. Co., 483 So. 2d 987 (La. 1986).

71. 498 So. 2d 742 (La. 1986).

72. 499 So. 2d 1330 (La. App. 3d Cir. 1986).

> Due to the continuing attorney-client relationship between the Oliviers and Gibbs, we find that the civilian doctrine of contra non valentum comes into play to suspend the running of prescription until such time that the Oliviers could practically have brought a malpractice suit against Gibbs, i.e. upon the termination of the attorney-client relationship.[73]

In *Barre v. St. Martin*,[74] the court found that prescription did not begin to run until the plaintiff had been evicted from immovable property and that the suit had been filed within one year from that date. The exception of prescription, sustained by the trial court, was reversed. A malpractice suit against a notary public who allegedly prepared a defective assumption deed was maintained against a plea of prescription; the malpractice action had been filed within one year from the time the petitory action was filed against the property owner, who was then obligated to defend or lose the disputed property.[75]

Lawyers who issue title opinion letters may take some comfort in *Crawford v. Gray and Associates*,[76] wherein the second circuit followed the *Cherokee Restaurant*[77] case in its holding that when an attorney states in a title opinion letter that "according to my examination . . . has a valid and merchantable title," he has not expressly warranted or guaranteed title to property so as to fall within the ten year prescriptive period. Practitioners should look at their form of title opinion letter and make sure that it is not stated in the form of a guaranty or warranty, but is stated in the form of an opinion by the attorney.

In this day and time attorneys should always be wary of conflicts of interest, particularly when the attorney's interests conflict with the client's interests. If full disclosure is not made and the case turns out badly, such conflicts are an open invitation to a malpractice suit. As stated in *Dier v. Hamilton*,[78] the Code of Professional Responsibility imposes a duty upon attorneys to disclose possible conflicts of interest. The plaintiff alleged that she had an attorney-client relationship with the subject attorney. She accused the attorney of negligence and professional impropriety for allegedly giving her improper and partial legal advice due to his own financial interests and his representation of clients with adverse interests. The trial court had sustained an exception of no cause of action which was reversed by the second circuit.

Finally, attorneys should be careful in selecting their malpractice insurer. In *First Guaranty Bank v. Attorney's Liability Assurance So-*

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73. Id. at 1337.
74. 499 So. 2d 607 (La. App. 5th Cir. 1986).
75. Succession of LaSalle v. Clark, 503 So. 2d 694 (La. App. 3 Cir. 1987).
76. 493 So. 2d 734 (La. App. 2d Cir. 1986).
77. Cherokee Restaurant, Inc. v. Pierson, 428 So. 2d 995 (La. App. 1st Cir. 1983).
78. 501 So. 2d 1059 (La. App. 2d Cir. 1987).

ciety,[79] the malpractice insurer filed an exception to the personal jurisdiction over it by the Orleans Parish Civil District Court. On appeal, the fourth circuit sustained the objection, holding that the insurer was not transacting business in Louisiana within the meaning of the Louisiana Insurance Code. The supreme court has granted writs, but in the meantime there has to be considerable concern as to whether or not the attorney has insurance.

Discipline

The report filed by the Committee on Professional Responsibility in the June issue of the Louisiana Bar Journal shows that over forty disciplinary actions were pending.[80] In the last year, ten supreme court decisions were published which involved the suspension or disbarment of members of the Louisiana State Bar Association. Three attorneys were disbarred for commingling and converting their clients' funds to their own use.[81] The only somewhat unusual feature of these cases was the "disbarment of an already disbarred attorney." Mr. Krasnoff had been disbarred in 1986,[82] but other matters were then pending. The court had to consider whether it was appropriate to address charges of misconduct instituted while the lawyer was a member of the Bar, but presented to the supreme court after a disbarment on other charges. Looking at the underlying purpose of lawyer discipline, the court concluded that it was proper for it to entertain the matter and extended the period of time during which Mr. Krasnoff could not petition for readmittance to five years from the date of the most recent disbarment.

In eight other matters, the supreme court imposed suspensions varying from eighteen months to three years.[83] In *Louisiana State Bar Ass'n v. Henrichs*,[84] *Louisiana State Bar Ass'n v. Lyons*,[85] and *Louisiana State Bar Ass'n v. Carpenter*,[86] discipline was imposed because of the attorney's

79. 506 So. 2d 595 (La. App. 4th Cir. 1987), writ granted, 508 So. 2d 56 (1987).

80. Report by the Comm. on Prof'l Resp., La. B.J. (June 1987).

81. Louisiana State Bar Ass'n v. Krasnoff, 502 So. 2d 1018 (La. 1987); Louisiana State Bar Ass'n v. Schmidt, 506 So. 2d 1186 (La. 1987); and Louisiana State Bar Ass'n v. Simons, 495 So. 2d 936 (La. 1986).

82. *Krasnoff*, 488 So. 2d at 1002.

83. Louisiana State Bar Ass'n v. Riley, 500 So. 2d 753 (La. 1987); Louisiana State Bar Ass'n v. Stewart, 500 So. 2d 360 (La. 1987); Louisiana State Bar Ass'n v. Carpenter, 502 So. 2d 1023 (La. 1987); Louisiana State Bar Ass'n v. Tilly, 507 So. 2d 182 (La. 1987); Louisiana State Bar Ass'n v. Lyons, 491 So. 2d 369 (La. 1986); Louisiana State Bar Ass'n v. Williams, 498 So. 2d 727 (La. 1986); Louisiana State Bar Ass'n v. Henrichs, 495 So. 2d 943 (La. 1986); and Louisiana State Bar Ass'n v. Price, 495 So. 2d 1311 (La. 1986).

84. *Henrichs*, 495 So. 2d 943.

85. *Lyons*, 491 So. 2d 369.

86. *Carpenter*, 502 So. 2d 1023.

neglect or failure to perform the legal services for which he had been hired. In *Carpenter* and *Lyons* the charges also included lying to the clients concerning the progress of the matter.

In *Louisiana State Bar Ass'n v. Tilly*[87] and *Louisiana State Bar Ass'n v. Price*,[88] both Tilley and Price had both been convicted of serious criminal charges. Tilley received a suspension of two years, and Price, a suspension of twenty-five months. The attorney in *Louisiana State Bar Ass'n v. Riley*[89] received a three year suspension for conversion of client funds and was also required to make full restitution. In *Louisiana State Bar Ass'n v. Stewart*,[90] Stewart, without any prompting and with no one breathing down his neck, confessed to subornation of perjury. The underlying problem was severe alcoholism. The court stated that the appropriate penalty for perjury and suborning perjury is generally disbarment. After considering Mr. Stewart's effort to solve his drinking problem, his voluntary disclosure of his misconduct, and the fact that his disclosure prevented any damage from occurring to any third parties, the court ordered an eighteen month suspension.

A rather unusual sanction was imposed in *Louisiana State Bar Ass'n v. Williams*.[91] The court found that Mr. William's ignorance as much as his lack of dedication to the ethical precepts contributed to his failure to adhere to the ideals of the profession. Mr. Williams had handled matters in which his own interests were in conflict with the interests of his client, had not made full disclosure of the conflict, and was guilty of dishonesty, deceit, and misrepresentation. A suspension of two years was imposed, but at the end of that two years, Mr. Williams must not only have made restitution to clients who were damaged by his actions, but also have attained a satisfactory score on the Multistate Professional Responsibility Exam to be taken as directed by the Committee on Professional Responsibility.

Conclusion

In the Code of Professional Responsibility can be found the following: "In appearing in his professional capacity before a tribunal, a lawyer shall not . . . [f]ail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intention not to comply."[92] This provision was omitted from the Model Rules because it was con-

87. 507 So. 2d 182 (La. 1987).
88. 495 So. 2d 1311 (La. 1986).
89. 500 So. 2d 753 (La. 1987).
90. 500 So. 2d 360 (La. 1987).
91. *Williams*, 498 So. 2d 727.
92. Model Code of Professional Responsibility DR 7-106(C)(5) (1980).

sidered too vague to be a rule of conduct enforceable as law. Here is another indication that the old concept of ethics as a branch of moral science, including an interest in the disciplines of philosophy, theology, literature, and history, is quietly passing away and being replaced by black letter rules which require no knowledge of those disciplines. In two recent cases, one from the first circuit[93] and one from the third circuit,[94] both courts held that the mere taking of a default judgment without notice to opposing counsel of the intention of doing so does not, of itself, constitute fraud or an illicit practice which would serve to nullify a default judgment. The writer concedes that as a decision under Louisiana Code of Civil Procedure article 2004, the court's opinion is correct. The writer would further concede that Rule 3.4 of the Louisiana rules does not specifically cover this situation. However, in the comment to Rule 3.4, fair competition is stressed, and although all of the facts leading up to the confirmation in each case are not brought out by the decisions, one cannot help but wonder if loyalty to the client should not be tempered more with loyalty to the system of justice and fairness to opposing parties.

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93. Alfonso v. Cement Prods. Servs., Inc., 499 So. 2d 305 (La. App. 1st Cir. 1986).

94. Herman v. Louisiana Health Serv. and Indem. Co., 492 So. 2d 250 (La. App. 3d Cir. 1986).